



MONTGOMERY COUNTY ETHICS COMMISSION

Steven Rosen
Chair

Kenita V. Barrow
Vice Chair

September 11, 2017

Advisory Opinion 17-08-014

A Community Health Nurse II with the Department of Health and Human Services (DHHS), Infectious Disease division, Dennis Avenue Health Center at 2000 Dennis Avenue, Silver Spring seeks a waiver of the outside employment prohibition of Montgomery County Public Ethics Law Section 19A-12(b)(1)(B). The ethics law provides that unless waived by the Ethics Commission, a County employee is prohibited from working for an entity that "negotiates or contracts with the County agency with which the public employee is affiliated." The employee seeks the waiver so that she can engage in outside employment for the Primary Care Coalition which contracts with DHHS. As discussed further below, the Primary Care Coalition contract with DHHS is for tobacco cessation related activities.

The employee also seeks a waiver of 19A-11(a) of the ethics law as she intends to engage in activities while performing her County job that relate to the outside employment position she would have with the Primary Care Coalition. Without a waiver of section 19A-11 of the Public Ethics Law, the employee is prohibited from working as a County employee on matters affecting the Primary Care Coalition and on matters in which the Primary Care Coalition is a party.

For the reasons stated further below, the Ethics Commission denies the request for a waiver.

The employee has been employed full-time by the County since May 2000. She works as a nurse for the human immunodeficiency virus (HIV) clinic. Among other things, she assists physicians with medical procedures, draws blood as needed, reviews lab work results, and notifies the physicians of any abnormal lab work. She triages phone calls, schedules appointments and processes referrals as needed. She provides education to patients on HIV, including disease management and prevention of transmission. She also works closely with other team members including other nurses and case managers.

For the Primary Care Coalition, she would like to work as a Tobacco Treatment Specialist in the community at various locations such as: shelters, churches, substance abuse treatment centers and other community centers. She would work twice a year facilitating smoking cessation classes (usually two 4-6 week classes in the fall and in the spring of the year.) She would also work as needed with individuals that reside in Montgomery County, who express an interest in

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wanting to quit smoking. The group sessions are usually in the evenings from 6:00PM – 9:00PM. Her work for the Primary Care Coalition is funded by the County pursuant to its contract with the Primary Care Coalition for tobacco cessation activities.

Not only would the outside employment be funded by the County, the employee's job with the County intersects with the proposed outside employment as a Tobacco Treatment Specialist. Many patients at the HIV clinic require tobacco cessation care. While on County duty, the employee would receive referrals from the physicians that work with her in the HIV clinic of persons who may benefit from tobacco cessation counseling. These referrals would occur during her regular work hours at the HIV clinic. She would introduce herself to the patient and give them a questionnaire to complete and set up a time during her lunch hour or after her scheduled work time for them to meet with her in her capacity as an employee of the Primary Care Coalition.

Section 19A-8(b)(3) permits the Commission to waive the prohibition of 19A-12(b)(1) where the employment is not likely to create an actual conflict of interest. Section 19A-8(b)(1) and (b)(2) provide alternative standards for waiver from the outside employment prohibition of 19A-12(b). Pursuant to these standards, a waiver of the prohibition of 19A-12 on outside employment with an agency contractor can be granted where "the waiver is needed to ensure that competent services to the County are timely and available" or that "failing to grant the waiver may reduce the ability of the County to hire or retain highly qualified public employees."

Also, to waive the conflict prohibition in 19A-11 of the County Code to expressly allow the employee to work in her County job on matters affecting the Primary Care Coalition's contract for tobacco cessation services, a waiver would need three findings (see 19A-8(a)):

- 1) the best interests of the County would be served by granting the waiver;
- 2) the importance to the County of a public employee or class of employees performing official duties outweighs the actual or potential harm of any conflict of interest; and
- 3) granting the waiver will not give a public employee or class of employees an unfair economic advantage over other public employees or members of the public.

The request for a waiver of 19A-12 states that the waiver is needed:

to ensure that competent services to the County are timely and available because there is a vested County interest in ensuring that a competent facilitator provides smoking cessation services to County residents, especially to a population that is both highly affected and can be difficult to service such as the HIV population. Given the vulnerability of this population, the dual role this waiver would allow provides a unique opportunity to maximize the impact of both programs in serving this population.

Additionally, the waiver request states that 19A-11 should be waived as the County has a vested interest in serving the HIV population and promoting tobacco cessation; that the benefits of the

arrangements outweighs any conflict; and that no unfair advantage is obtained by the employee through the arrangement.

DHHS concurred in the request for a waiver. DHHS cited to the benefits of the tobacco cessation effort and to the employee's expertise and status in the HIV medical clinic as establishing her to be the "perfect smoking cessation facilitator for this population. . . . Her involvement in both programs also allows [the employee] to provide a measure of continuity of care if her HIV clients happen to participate in the contracted smoking cessation program."

DHHS believes the potential for abuse is small as the execution of the employee's role would not affect the amount of funds paid on the contract between DHHS and the outside employer. DHHS indicates that any conflict is outweighed by the benefit the HIV clients would receive from the involvement of the employee. DHHS also recommends that if the Ethics Commission is unwilling to grant a full waiver, that the Commission grant a waiver temporarily to allow DHHS time to alter the contract with the Primary Care Coalition for FY19 to mitigate the conflict.

The Ethics Commission denies the request for a waiver.

The standards for a waiver of 19A-12 contemplate that there is no actual conflict of interest, the waiver is need to ensure competent services to the County, or failing to grant the waiver may reduce the County's ability to retain highly qualified public employees. Here there is an actual conflict of interest between the employee's outside employment and her County position as actions the employee would be taking in her official capacity affect her outside employer and the work she performs for the outside employer. Further, the Commission does not believe the employee, with DHHS's concurrence, has demonstrated how the waiver is needed to ensure competent services are timely and available or that failing to grant the waiver relates to the issue of employee retention. With respect to the requested waiver of 19A-11, the Commission does not believe the County's best interests would be served by granting the waiver. However worthy the cause, the establishment of a County contract that permits a private entity to compensate a County employee in matters relating to the exercise of the employee's County job is antithetical to the ethics law. In the present circumstance, there is a purposeful intermingling of the employee's public and private activities: the employee would, while on the County job, be making arrangements with County patients for them to receive services from the same employee working for the outside contractor. (The Commission acknowledges the DHHS argument that the number of referrals generated has little or no financial impact on the contractor or the employee, but is not persuaded that the harm of the arrangement is a function of the number of referrals made. The worst aspect of the conflict is in having the employee serve the outside employer's interests while performing her County duties, which is what is being done through the referral process that is contemplated.)

While the Commission understands that DHHS has concluded that this is a beneficial way to obtain desired results, the Commission recommends that traditional employment arrangements be made that do not involve an employee conflict of interest, such as paying DHHS employees to cover all work DHHS would want those employees to perform and/or hiring contractors to perform services (without those contractors engaging County employees to perform the work.)

DHHS requests that in lieu of a permanent waiver, the Commission grant a temporary waiver so the agency has time to implement a human resource or contract solution so the County can continue to maintain the tobacco cessation services pending making new arrangements. The Commission is not temporarily waiving the ethics law to permit this built-in conflict of interest for the DHHS employee.

For the Commission:



Steven Rosen, Chair